SUPREME COURT OF QUEENSLAND

CITATION:	*Deputy Commissioner Stewart v Dark* [2012] QCA 228
PARTIES:	**DEPUTY COMMISSIONER IAN STEWART** (applicant) **v** **ANTHONY DARK** (respondent)
FILE NO/S:	Appeal No 475 of 2012 QCAT No 47 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Queensland Civil and Administrative Tribunal Act*
ORIGINATING COURT:	Queensland Civil and Administrative Tribunal at Brisbane
DELIVERED ON:	24 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	27 July 2012
JUDGES:	Muir and Gotterson JJA and Mullins J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Leave to appeal be granted.** **2. The appeal be allowed.** **3. The decision of the Appeal Tribunal contained in paragraphs 3(iv) and 3(viii) be set aside.** **4. The matter be remitted to the Appeal Tribunal to determine the sanction to be imposed on the respondent.**
CATCHWORDS:	POLICE – INTERNAL ADMINISTRATION – DISCIPLINE AND DISMISSAL FOR MISCONDUCT – QUEENSLAND – where respondent was a Queensland Police Service constable – where respondent directed to attend a disciplinary hearing involving nine matters of alleged misconduct that occurred in the course of a bitter marriage breakdown with his wife – where applicant found six matters were substantiated and amounted to misconduct – where sanction of dismissal from QPS imposed – where respondent applied to QCAT to review applicant's decision – where QCAT member confirmed five of the matters and the sanction – where the member set one matter aside – where respondent then appealed to the QCAT Appeal Tribunal – where Appeal Tribunal confirmed two matters (1 and 2), set aside remaining four matters, quashed the sanction dismissing the respondent from QPS and imposed a six month

suspension – where applicant submits Appeal Tribunal erred in finding that respondent's behaviour in two of the unsubstantiated matters (3 and 4) did not amount to misconduct – where applicant submits sanction imposed with respect to matters 1 and 2 was manifestly inadequate – where respondent submits that even if it was found Appeal Tribunal erred in determining that matters 3 and 4 did not amount to misconduct, this Court should remit the matter back to the Appeal Tribunal to determine the appropriate sanction along with matters 1 and 2 – whether matters 3 and/or 4 amounted to misconduct – whether sanction imposed manifestly inadequate – whether matter should be remitted to the Appeal Tribunal to determine sanction

Oaths Act 1867 (Qld)
Police Service Administration Act 1990 (Qld), s 1.4
Police Service (Discipline) Regulations 1990 (Qld), s 5, s 9(1)(f), s 10(f)

Aldrich v Ross [2001] 2 Qd R 235; [2000] QCA 501, considered
Clyne v NSW Bar Association (1960) 104 CLR 186; [1960] HCA 40, cited
Henry v Ryan [1963] Tas SR 90, cited
McKenzie v Acting Assistant Commissioner Wright [2011] QCATA 309, cited
New South Wales Bar Association v Evatt (1968) 117 CLR 177; [1968] HCA 20, cited
Police Service Board v Morris (1985) 156 CLR 397; [1985] HCA 9, considered
R v Teachers Appeal Board; Ex parte Bilney (1984) 35 SASR 492, cited
Re Bowen [1996] 2 Qd R 8; [1995] QSC 284, considered
Staples v Deputy Commissioner Stewart [2011] QCAT 582, cited
Ziems v Prothonotary of Supreme Court (NSW) (1957) 97 CLR 279; [1957] HCA 46, cited

COUNSEL: S A McLeod for the applicant
P J Flanagan SC, with P E Smith, for the respondent

SOLICITORS: QPS Solicitors Office for the applicant
Gilshenan & Luton for the respondent

[1] **MUIR JA: Introduction** The applicant seeks leave to appeal against the decision of the Appeal Tribunal of the Queensland Civil and Administrative Tribunal ("QCAT") delivered on 9 December 2011. The applicant also applied for an extension of time within which to apply for leave to appeal, the application for leave to appeal having been filed four days late. The application for an extension of time was unopposed and granted at the commencement of the hearing of the appeal.

[2] At relevant times the respondent was a constable in the Queensland Police Service ("QPS"). The applicant is and was a Deputy Commissioner of Police.

[3] On 11 September 2009, the respondent was served with a direction to attend a disciplinary hearing involving the following matters:

1. improper conduct in that the respondent pleaded guilty in the Caloundra Magistrates Court on three occasions between November 2007 and January 2008 to contravening Temporary Protection Orders issued under the *Domestic and Family Violence Protection Act* 1989 (Qld);

2. improper conduct in stating untruthfully to Inspector Schultz that the respondent had not accessed Kim Dark's email account;

3. improper conduct in being untruthful to Acting Senior Sergeant Flanagan in stating that he was home sick with the flu on 12 September 2008 and 16 September 2008;

4. improper conduct on or about 28 March 2007 in providing false and misleading information in a statutory declaration to Kim Dark (elsewhere referred to Ms James);

5. improper conduct on or about 28 March 2007 in forging the signature of a Commissioner for Declarations on a statutory declaration under the provisions of the *Oaths Act* 1867 (Qld);

…

9. improper conduct on 11 July 2008 in using QPS resources to make telephone calls to Ms Robinson in order to harass her.

[4] On 2 February 2010 the applicant delivered findings and reasons. He found matters 1, 2, 3, 4, 5 and 9 substantiated and that in each case the subject conduct amounted to misconduct. The sanction of dismissal was imposed in respect of these matters pursuant to s 5 and s 10(f) of the *Police Service (Discipline) Regulations* 1990 (Qld).

[5] The respondent applied to QCAT to review the applicant's decision. On 17 January 2011, a member of QCAT made orders confirming the decisions in matters 1, 2, 3, 4 and 5, setting aside the decision in matter 9 and confirming the respondent's dismissal from the QPS.

[6] The respondent then appealed to the QCAT Appeal Tribunal which, on 9 December 2011, after a hearing on the papers, confirmed the member's decision in respect of matters 1 and 2, set aside her decision in respect of matters 3, 4, 5 and 9, on the basis that the charges were unsubstantiated, and quashed the decision to dismiss the respondent from the QPS. The application to this Court for leave to appeal is only in respect of matters 3 and 4 and the sanction imposed on the respondent: a six month suspension.

Matter 3

[7] Matter 3 was described as follows in the direction to attend a disciplinary hearing:

> "**<u>Matter 3</u>**
>
> That on the 18th day of October 2008 at Maroochydore your conduct was improper in that you:
>
> (a) were untruthful to Acting Senior Sergeant Michael Flanagan when you stated that between 12 September 2008 and 16 September 2008 you were home sick with the flu.

[*Section 1.4 of the Police Service Administration Act 1990, Section 9(1)(f) of the Police Service (Discipline) Regulations 1990*]

Further and Better Particulars

Investigations have identified that:

- on 18th day of October 2008 Acting Senior Sergeant Michael Flanagan questioned you in respect to your absence from work from 12 September 2008 and 16 September 2008 inclusive;
- you stated that you were home sick with the flu;
- you then stated that you had driven your girlfriend['s] son to a party on the Gold Coast and returned home to the Sunshine Coast.
- you then stated that you went away with a person by the name of Dee for the weekend on the Gold Coast."

[8] The submissions of counsel for the applicant in relation to Matter 3 were to the following effect. The Appeal Tribunal found the allegation that the respondent lied proven and that the respondent's "motivation in lying was to protect his privacy". However, it was held that the lie was not "about a private matter … [but] about his reason for not being able to fulfil his duties as an officer". The Appeal Tribunal concluded that although the lie related to the respondent's obligations as an employee rather than his conduct towards another person, it constituted a breach of discipline rather than misconduct. The applicant contended that the Appeal Tribunal erred in not finding that the subject conduct amounted to misconduct. The argument was developed as follows.

[9] There was no basis upon which the Appeal Tribunal could conclude that the conduct amounted to a breach of discipline. The subject conduct constituted misconduct because it was inconsistent with the standards expected of a police officer by the QPS and the community at large. In support of this contention, counsel cited the following passage from the reasons of Demack J in *Re Bowen*:[1]

> "Disciplinary proceedings within the police service are analogous to disciplinary proceedings taken against a barrister. In *Clyne v. The New South Wales Bar Association* (1960) 104 C.L.R. 186, which concerned the striking of a barrister from the rolls, the High Court said, at 201:
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> > 'Although it is sometimes referred to as "the penalty of disbarment", it must be emphasized that a disbarring order is in no sense punitive in character. When such an order is made, it is made, from the public point of view, for the protection of those who require protection, and from the professional point of view, in order that abuse of privilege may not lead to loss of privilege.'

1 [1996] 2 Qd R 8 at 9.

> This principle was re-iterated in *The New South Wales Bar Association v. Evatt* (1968) 117 C.L.R. 177, at 183."

[10] Counsel also relied on the following passage from the reasons of Brennan J in *Police Service Board v Morris*,[2] which passage was also quoted by Demack J[3] in *Re Bowen*:

> "The Victoria Police, like other Police Forces in Australia, is a force governed by legislation which Crockett J in the Full Court appropriately described in these terms:
>
> > 'The legislation is designed to regulate and control the activities of what is a disciplined force in such a way as to achieve an effective and efficient organisation in which the members are to perform their duties in conformity with a code so as to afford protection to the community and allow the disciplining of members who breach that code.'"

[11] Reference was made also to the observations of Thomas JA in *Aldrich v Ross*,[4] in which his Honour said in respect of misconduct and disciplinary proceedings within the police force:

> "The protection of the public, the maintenance of public confidence in the Service and the maintenance of integrity in the performance of police duties are the primary purposes of such proceedings."

[12] Untruthfulness in dealings with a superior has been recognised as a dangerous quality in a police officer as it erodes public confidence and destroys the trust of other members of the police force.[5]

[13] The substance of the argument advanced by counsel for the respondent was as follows. The Appeal Tribunal accepted that misconduct in an officer's private life may be destructive of his authority and render him unfit to continue in his office. The deputy president quoted, with approval, a statement in *Smith v Cullinan*,[6] that conduct which occurs in an officer's private life will not qualify as misconduct, unless it is conduct that a reasonable citizen may confidently be expected to regard as morally or socially blameworthy in a police officer. The Appeal Tribunal accepted that conduct outside the public eye could constitute misconduct if it did not meet the standard of conduct the community reasonably expected of a police officer and correctly identified that the respondent's conduct in lying about his whereabouts during sick leave related to his obligations as an employee.

[14] The context of the lie justified the finding of breach of discipline rather than misconduct. The respondent had alerted police to his true whereabouts during the period of his sick leave and he had a genuine medical certificate and was actually sick.

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2 (1985) 156 CLR 397 at 411 – 12.
3 At 9.
4 [2001] 2 Qd R 235 at 257.
5 *Re Bowen* [1996] 2 Qd R 8 at 9 – 11.
6 Misconduct Tribunal Appeal No 4 of 1996.

[15] The matters which counsel for the respondent principally relied on to establish context were as follows. The false statements concerning the respondent's whereabouts when absent on sick leave were made by the respondent when under a great deal of stress arising from the breakdown of his marriage and the ensuing bitter matrimonial dispute with his then wife. The false statements were made to the superior officer at a time when that officer was not in uniform or on duty. When making the false statements the respondent believed that a person or persons in his workplace had been providing information of a personal nature relating to him and his wife which was potentially detrimental to his interests and he was endeavouring to protect his privacy.

[16] Counsel for the respondent also relied on the fact that the respondent had told the truth in a formal interview with Inspector Schultz in the course of a disciplinary investigation which followed the September 2008 questioning by officer Flanagan.

Consideration

[17] The definitions of "misconduct" and "breach of discipline" in s 1.4 of the *Police Service Administration Act* 1990 are as follows:

> "***breach of discipline*** means a breach of this Act, the *Police Power and Responsibilities Act 2000* or a direction of the commissioner given under this Act, but does not include misconduct.
>
> …
>
> ***misconduct*** means conduct that –
>
> (a) is disgraceful, improper or unbecoming an officer; or
>
> (b) shows unfitness to be or continue as an officer; or
>
> (c) does not meet the standard of conduct the community reasonably expects of a police officer."

[18] It was accepted by the parties, and is established by the authorities, that it is not necessary that in order for conduct to constitute "misconduct" it must be acts or omissions relating directly to a police officer's employment as a police officer or the performance of the police officer's duties.[7] In order to constitute misconduct, conduct must come within one or more of the three paragraphs in the definition of "misconduct".

[19] Matter 3 concerns the untruthfulness of the respondent when being questioned by a superior in relation to a work related matter. The Appeal Tribunal recognised that although the respondent was lying to protect his personal interests, the lie was not about a private matter. However, the Appeal Tribunal regarded it as a mitigating factor that the conduct related to "his obligations as an employee, rather than his conduct towards another person". It also appears to have been considered that a lie about sick leave was, of its nature, less reprehensible than lies about many other matters. The deputy president said in this regard:

> "I do not consider the reasonable citizen would consider a lie about sick leave as morally or socially blameworthy of a police officer, because he was a police officer."

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7 *Henry v Ryan* [1963] Tas SR 90.

[20] Those observations suggest to me that in considering Matter 3 the Appeal Tribunal may not have had sufficiently in mind the considerations which render a police officer's untruthfulness to a superior inherently more serious than the untruthfulness of an employee in many other areas of employment in both the public and private sectors. The considerations to which I refer are discussed later.

[21] In my respectful opinion, the Appeal Tribunal appears to have failed to have sufficient regard to the trust members of the community and a police officer's peers and superiors ought to be able to repose in him. Colleagues, whether superior or inferior in rank, ought to be able to have confidence in an officer's integrity; confidence that he or she will perform his or her duty unswervingly without fear or favour.

[22] The deputy president's conclusion that "[t]his is another example of [the respondent] lying to protect his personal interests and drawing fine distinctions to justify when he will or will not tell the truth" may be thought to favour the conclusion that the subject conduct was likely to materially and adversely affect his fellow officers confidence in his integrity. This finding has relevance to the question of penalty.

[23] However, despite the foregoing, the quite remarkable circumstances in which the subject conduct occurred justified the Appeal Tribunal's finding that misconduct was not proved. In this regard, I refer to the circumstances relied on by the respondent and, in particular, his not irrational fear that information about his movements, if divulged to his former wife, could be used to his detriment. This ground of appeal was not made out.

[24] Before passing from this matter, I should note that, for the reasons given later, the fact that the respondent was suffering from stress at the relevant time is of limited relevance to the question of whether the behaviour amounted to misconduct. Nor does it seem to me that the admissions made by the respondent, once an investigation had commenced and the possibility of an adverse outcome was likely to have been adverted to him, have much bearing on that question.

Matter 4

[25] Matter 4 was described as follows in the direction to attend a disciplinary hearing:

> "**Matter 4**
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> That on or about the 28th day of March 2007 at Palmwoods your conduct was improper in that you:
>
> (a) provided false and misleading information in a Statutory Declaration to Kim Dark.
>
> [*Sections 1.4 of the Police Service Administration Act 1990, Section 9(1)(f) of the Police Service (Discipline) Regulations 1990*]
>
> **Further and Better Particulars**
>
> Investigations have identified that:
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> • you separated from your then wife Kim Dark on 30th day of September 2007;

- the property at 39 Petigrain Avenue Palmwoods was purchased during your marriage;
- there were proceedings in the Family Court in respect to your marriage separation;
- you prepared a Statutory Declaration under the provisions of the *Oaths Act 1867* dated 28 March 2007 stating that you forfeit all rights that you may have in regards to the property situated at 39 Petigrain Avenue Palmwoods; and
- during your discipline interview with Senior Sergeant Campbell on 18 November 2008 you admitted that the information contained in the Statutory Declaration was false and you had no intention of signing your rights to the property at 39 Petigrain Avenue Palmwoods over to her."

[26] Counsel for the appellant argued that central to the Appeal Tribunal's determination that the respondent's conduct did not amount to misconduct was the finding that:

> "… there was no direct connection to his duties, status or authority as a police officer. It did not involve any use or abuse of police information or resources. The conduct only had implications for the property dispute with his wife."

[27] The argument was then developed as follows. The Appeal Tribunal's finding failed to have regard to the fact that the respondent's actions called into question his fitness to discharge his duties as a police officer because it showed a lack of integrity.[8] The approach of the Appeal Tribunal is inconsistent with other Tribunal decisions, both at first instance and on appeal.[9]

[28] Counsel for the respondent argued that there was no error revealed in the subject finding when read in context. The context was identified as that contained in paragraphs [54] – [57] of the deputy president's reasons, namely "an extraordinarily bitter marriage breakdown" in which Ms James made numerous and persistent complaints leading police officers to become "enmeshed in the demise of this marriage". Furthermore, the dispute encompassed Ms James' desire to acquire the full interest in the matrimonial home and the declaration was provided by the respondent "to mollify" her.

[29] It was submitted that whilst making a false or misleading statement to one's spouse may be considered dishonourable, it is ultimately a private matter. The Appeal Tribunal's approach, it was contended, was not inconsistent with Tribunal decisions in that it is plain that the Appeal Tribunal was not asserting that misconduct in an officer's private life could not constitute misconduct.

Consideration

[30] The Appeal Tribunal did not uphold the Tribunal's finding that the respondent swore a false statutory declaration. It proceeded on the basis that the respondent

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8 *Henry v Ryan* [1963] Tas SR 90 at 91; and *R v Teachers Appeal Board; Ex parte Bilney* (1984) 35 SASR 492 at 496 – 7.

9 *McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309; and *Staples v Deputy Commissioner Stewart* [2011] QCAT 582.

had falsely stated in a document in the form of a statutory declaration provided to Ms James that he would forfeit all rights in the matrimonial home. That was against the background of proceedings between the respondent and Ms James in the Family Court.

[31] It is not entirely clear what advantage the respondent sought to gain from the use of the document. It emerges from paragraph [57] of the member's reasons that, at the time it was signed, the respondent had moved back into the home and was refusing to leave. Ms James told the respondent that she wanted "to pay him out of the house", but the respondent said he did not want that and "would sign it over to [her]". When she advised him of legal advice that it would cost $3,000 to transfer the whole interest in the house into her name, the respondent told her that he would "sign a 'stat dec' which would mean that [she] wouldn't have to spend the money on 'legals' or go to court". The deputy president said in her reasons that the respondent "admitted to intending to mislead [Ms James] about his intentions with respect to the home, in order to *shut her up*".

[32] The deputy president observed:

> "Counsel for the Deputy Commissioner did not offer any specific nexus between a false statement made in an officer's personal life and their reputation, status or authority as a police officer. Mr Dark's deliberate and false statement of intention was dishonourable. It reflects poorly on his character, but the Appeal Tribunal must assess this in the context of the unwanted breakdown of a lengthy marriage. Not every act of dishonesty i[n] an officer's private life can be considered misconduct."

[33] It may be accepted that not every act of dishonesty in a police officer's private life will constitute misconduct. The nature of the act and the circumstances in which it took place must be considered with a view to determining whether the conduct reveals such a lack of integrity or want of character as to substantially erode the trust and confidence that the officer's colleagues and/or the members of the public are entitled to repose in him or her.[10]

[34] Plainly, the formal assertion of a relinquishment of an interest in the matrimonial home was one of substance and involved the misleading by the respondent of his then spouse in order to gain a material advantage. The fact that the conduct occurred against the background of a bitter matrimonial dispute may serve to explain the behaviour, but can hardly excuse it. The respondent's duplicity was studied and involved the use of a purported statutory declaration to lend solemnity to his protestations. This serious duplicity, as the Appeal Tribunal found, was dishonourable and reflected poorly on his character.

[35] The fact that the conduct occurred when the respondent was suffering from stress may engender some understanding of his conduct and sympathy for him, but it does not bear strongly on the conclusions capable of being drawn about his character and integrity. The great majority of people behave with propriety and integrity in the absence of stress, adversity or temptation. However, it is often when a person is tested by such conditions and circumstances that his or her character is fully revealed. Police officers are commonly placed in situations of considerable stress

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10 *Ziems v Prothonotary of Supreme Court (NSW)* (1957) 97 CLR 279 at 286.

and may also be subjected to strong temptation from time to time. The expectation of the QPS and the public is that officers will resist any such temptation and will continue to behave with due propriety regardless of stress.

[36] In my respectful opinion, the respondent's behaviour constituted misconduct. It was such as to engender a lack of trust on the part of other police officers and members of the public. This ground of appeal was made out.

Matters 1 and 2

[37] Matters 1 and 2 were:

> "**Matter 1**
>
> That on the 10th day of June 2008 at Caloundra your conduct was improper in that you:
>
> (a) pleaded guilty at the Caloundra Magistrates Court that on 6 November 2007 you contravened a Temporary Protection Order issued at the Maroochydore Magistrates Court on 16 October 2007 under the provisions of the *Domestic and Family Violence Act 1989;*
>
> (b) pleaded guilty at the Caloundra Magistrates Court that on 8 November 2007 you contravened a Temporary Protection Order issued at the Maroochydore Magistrates Court on 16 October 2007 under the provisions of the *Domestic and Family Violence Act 1989*; and
>
> (c) pleaded guilty at the Caloundra Magistrates Court that between 23 December 2007 and 31 January 2008 you contravened a Protection Order issued at the Maroochydore Magistrates Court on 27 November 2007 under the provisions of the *Domestic and Family Violence Act* 1989.
>
> [*Section 1.4 of the Police Service Administration Act 1990, Section 9(1)(f) of the Police Service (Discipline) Regulations 1990*]
>
> **Further and Better Particulars**
>
> Investigations have identified that:
>
> • on 10 June 2008 you appeared in the Caloundra Magistrates Court and pleaded guilty to two charges of breaching a Temporary Protection Order and one charge of breaching a Protection Order;
>
> • the Magistrate ordered that you be released upon entering into a recognizance in the sum of $1800.00 on condition that you must appear before the Court to be sentenced at a future sitting of the Court if called on within the next 18 months and in the meantime must keep the peace.

Matter 2

That on 13th day of September 2007 at Maroochydore your conduct was improper in that you:

(a) were untruthful to Inspector Schultz when you stated that you had not accessed Kim Dark's email account.

[*Section 1.4 of the Police Service Administration Act 1990, Section 9(1)(f) of the Police Service (Discipline) Regulations 1990*]

Further and Better Particulars

During your disciplinary interview with Inspector Schultz on 19 October 2007:

- you were directed to answer truthfully; and
- you admitted to Inspector Schultz that during your conversations with him on 13 September 2007 you told him a lie when you said that you had not accessed Kim Dark's email account."

[38] Counsel for the appellant submitted that the Appeal Tribunal had erred in not finding that the respondent's conduct amounted to misconduct at the more serious end of the spectrum which seriously undermined public confidence in the QPS. It was submitted also that the Appeal Tribunal misunderstood the principles articulated in *Aldrich v Ross* and *Re Bowen*, referred to above. The remaining contention was that the Appeal Tribunal erred in failing to have due regard to the views of the original decision maker.

[39] Counsel for the respondent argued to the following effect. The Tribunal ordered a general sanction in respect of the five substantiated grounds of misconduct. The Appeal Tribunal found only Matters 1 and 2 substantiated. Even if this Court considered that the Appeal Tribunal erred in determining that Matters 3 and 4 did not constitute misconduct, the sanction imposed by the Appeal Tribunal would not thereby be demonstrated to be manifestly inadequate. The appropriate course would be to remit the matter to the Appeal Tribunal to determine the appropriate sanction in the context of the established misconduct in Matters 1 and 2. That course would recognise QCAT's role in the imposition of sanctions.[11]

[40] In the context of the conduct identified in Matters 1 and 2, it could not be said that the sanction imposed by the Appeal Tribunal was manifestly inadequate. As was observed in paragraph [118] of the deputy president's reasons, the breaches of the order and the lie occurred in the context of the breakdown of a lengthy marriage.

Consideration

[41] The particulars of the three charges to which the respondent pleaded guilty in the Magistrates Court are:

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11 See *McKenzie v Acting Assistant Commissioner Wright* [2011] QCATA 309.

> "**Charge 1:** Contacting the aggrieved on 6 November 2007 and using words to the effect *'tell the children that I love them'* …;
>
> **Charge 2:** Contacting the aggrieved on 8 November 2007 and using the words *'get fucked'* …;
>
> **Charge 3:** During the period of 23 December 2007 and 31 January 2008, making a *'number of inappropriate contacts and that these contacts were with the complainant via telephone conversation and SMS messaging, and that was … contrary … to the order'* …"

[42] On appeal to the Appeal Tribunal, the respondent did not challenge the Tribunal's finding in relation to Matter 1, but argued that the sanction of dismissal was manifestly excessive. The Appeal Tribunal, after detailing the breaches of the Domestic and Family Protection Orders held that:

> "There is an extra element to a breach of such an order by a police officer. Although, in general terms, a police officer has a role at large to enforce the law, there is a more direct involvement by police in enforcing compliance with these orders. They are at the front line of regulating behaviour in circumstances of domestic conflict. If police officers fail to comply with them, this undermines their effectiveness to deter unacceptable behaviour by others. In my view, a member of the public would reasonably consider that repeated breaches of an order, even without actual or threatened violence, is morally or socially blameworthy of the officer, as a police officer, and warrants more than a nominal sanction."

[43] I respectfully agree with those views.

[44] In relation to Matter 2, the respondent admitted to the applicant that he had lied to Inspector Schultz, but he argued before the Tribunal and the Appeal Tribunal that the conduct was a breach of discipline and that the sanction imposed was excessive. The deputy president carefully analysed the respondent's conduct and noted that it was such that it, arguably, "could justify a domestic violence and family protection order". It was noted also that the respondent's lie resulted in a superior having to further inquire into Ms James' complaint.

[45] Although the Appeal Tribunal was satisfied that the conduct amounted to misconduct "because it undermines his authority as a police officer that, during a police investigation, he would lie to protect himself", the Appeal Tribunal concluded that dismissal "is an excessive penalty" and that:

> "A period of suspension of 6 months was in order, given [the respondent's] lie prolonged a police investigation into his own conduct and he repeatedly breached an order designed to restrain his contact with Ms James."

[46] The evidence does not provide details of the contacts involved in charge 1 apart from one being a message of professed affection. The deputy president noted that some of the charge 1 communications seemed to have been in response to

communications from Ms James. The magistrate ordered that the respondent be released on a recognisance in the sum of $1,800 for a period of 18 months during which he was required to be of good behaviour and keep the peace. No conviction was recorded. The magistrate accepted that the offending occurred when the respondent was "extremely distressed and actively suicidal" as a result of his failed marriage. He noted that the respondent had pleaded guilty "at a reasonably early opportunity". These matters were taken into account by the Appeal Tribunal.

[47] The Appeal Tribunal also gave consideration to the significance of the fact that the breaches of the court orders were committed by a police officer whose duties from time to time may well include the enforcement of compliance with such orders or the taking of action in respect of their breach. Because of the view I have reached about the desirability of remitting the matter to the Appeal Tribunal for determination of the appropriate penalty, it is unnecessary to deal with the parties' arguments in this regard in any detail.

[48] The Appeal Tribunal has not had the opportunity of considering the appropriate penalty in this matter in light of the findings as to misconduct in respect of matter 4. The conduct in respect of matter 4 must be looked at together with the conduct in respect of matters 1 and 2 and also, for that matter, 3 in order to arrive at the appropriate sanction.

[49] I accept the submission by counsel for the respondent that, having regard to the role of QCAT in the imposition of relevant sanctions, it is desirable that the matter be remitted to the Appeal Tribunal to determine the appropriate sanction having regard to these reasons.

[50] For the above reasons I would order that:

1. leave to appeal be granted;

2. the appeal be allowed;

3. the decision of the Appeal Tribunal contained in paragraphs 3(iv) and 3(viii) be set aside; and

4. the matter be remitted to the Appeal Tribunal to determine the sanction to be imposed on the respondent.

[51] **GOTTERSON JA**: I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[52] **MULLINS J**: I agree with Muir JA.